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IN THE

Supreme Court of the United States

October Term, 1944.

No. 657.

SEGAL LOCK & HARDWARE COMPANY, INC., NORWALK LOCK COMPANY and LOUIS SEGAL,
Petitioners,

v.

FEDERAL TRADE COMMISSION,
Respondent.

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

This is a petition for rehearing from the order of January 2, 1937 of this Court, denying the petition for writ of certiorari to the United States Court of Appeals for the Second Circuit.

This petition is submitted to this Court with the greatest respect and in good faith.

That a serious injustice has been done to the petitioners is apparent for there are no legal authorities to support the Commission's findings.

The decision below is erroneous and contrary to the facts.

The findings of the Commission are based on **no evidence whatsoever.***

The decision below is contrary to the great weight of authorities.

*Throughout petition emphasis ours.

There is no point of law relied on by the Commission which sustains the view that a **star chamber proceeding is justified.**

In this matter, the Federal Trade Commission has been arbitrary and has exceeded its authority.

There has been a serious and systematic miscarriage of justice in this case.

No federal agency has the right to deny a fair hearing. This has been done by the Federal Trade Commission.

No federal agency has the right to make a charge unless it proves such charge in an open and fair hearing **based on evidence.**

And it should not resort as in this matter to exclude the petitioners and the petitioners' attorneys and conduct a secret hearing on the only and relevant issue in the case, to wit, whether the petitioners' lock cylinder is "pick-proof".

Where the issue is material, proof is required in open court even assuming a trade secret may be involved.

Ironically, the case of *Crocker-Wheeler Co.* v. *Bullock*, 134 Fed. 241, **relied on by the Commission, in fact supports the petitioners' contention** with respect to the general rule as to trade secrets. In the case of *Crocker-Wheeler Co.* v. *Bullock, supra*, on page 245, the general rule as to trade secrets is set forth.

> "* * * if the giving of the testimony sought or the production of the documents called for will disclose what are characterized as 'trade secrets', the witness has a legal privilege to withhold **if it or they are irrelevant or otherwise inadmissible in evidence.** Wigmore on Evidence, Volume 3, Section 2212 * * *."

In other words, the privilege attaches **if the secret is immaterial and irrelevant to the issue, but if pertinent, it must be disclosed for the ascertainment of the truth. In**

the case at bar the real truth has never been ascertained because all of the pertinent and material facts with respect to the issue, namely, whether the Segal pickproof cylinder is pickproof was shrouded and sealed up in the secret hearing from which the petitioners and the petitioners' attorneys were systematically excluded.

In Section 2212 of Wigmore referred to in *Crocker-Wheeler Co.* v. *Bullock, supra*, it is further stated on page 245:

> "What the state of the law is would be difficult to disclose precisely. It is clear that **no absolute privilege for trade secrets is recognized**. On the other hand, courts are not apt to require disclosure except in such cases and to such an extent as may appear to be **indispensable for the ascertainment of the truth**. More than this in definition can as yet hardly be ventured."

And further with respect to trade secrets, the case of *Crocker-Wheeler Co.* v. *Bullock, supra*, further enunciates, bottom page 245:

> "The only serious question here is whether disclosure of trade secrets should be enforced **if they are relevant and admissible in evidence.** The last quotation from Wigmore indicates that in his opinion **it should be** provided they are indispensable for the 'ascertainment of the truth'. This is further indicated by the statement:"
>
> > "No privilege of secrecy should be recognized if the right of possibly innocent persons depends essentially or chiefly upon the disclosure in question."

Further on page 246 in the case of *Crocker-Wheeler Co.* v. *Bullock*, Judge Wallace stated:

> **"Considerations of inconvenience must give way to the paramount rights of litigants to resort to evidence which it may be in the power of the witness to produce and without which grave interest may be jeopardized and the administration of justice thwarted."**

And further on page 246 in the case of *Crocker-Wheeler Co.* v. *Bullock*, we find this important and salient statement:

> "The Court generally inclines towards this application and **requires an answer whenever it seems probable the testimony may be relevant.**"

It is obvious from the teachings of the case of *Crocker-Wheeler Co.* v. *Bullock* that the Federal Trade Commission violated the general rule with respect to trade secrets for all testimony relating to the performance and ability of the Commission's witnesses to pick open the petitioners' cylinder lock, is relevant and material, and therefore must be disclosed. Moreover, in the case at bar petitioners also **proved beyond a reasonable doubt that the art of picking locks is notoriously old and involves no trade secret whatsoever.**

In the case at bar, the Commission not only denied the petitioners the right to cross-examine the Commission's witnesses with respect to what picking means they employed in the secret hearing, but further excluded the petitioners and their attorneys from seeing the Commission's tests. Hence the credibility of the Commission's witnesses could not be attacked by the petitioners.

Moreover **the Commission has confused the issue.** The charge in the bill of complaint by the Federal Trade Commission specified that the petitioners' lock cylinder was **not pickproof.**

All that was required to prove such charge was to have a public demonstration, *not a secret* demonstration excluding the petitioners and their attorneys.

The Commission, therefore, failed in its duty to the public as the **real truth has not been determined.**

Instead it swung the magic wand in the secret hearing and *ipso facto*—the petitioners' cylinder was held to be not pickproof.

Findings of this sort by the Commission are thus absurd for they are based on no evidence.

Furthermore, a careful review of the authorities cited on behalf of the Federal Trade Commission discloses that **there is no case in point which sustains the Federal Trade Commission's contention to substantiate the fact that a secret hearing was proper,** for example, in the case of *Crocker-Wheeler Co.* v. *Bullock, supra*, the action therein was for breach of contract. A subpoena *duces tecum* was issued for the production of certain books. The question was whether these books *were relevant* even though they contained confidential information. The Court held the books *not* relevant to the issue and held their production would be prejudicial.

If the books *were relevant* to the issue, obviously the Court would have held and would have ordered them produced even though prejudicial.

A careful analysis of the other cases relied on by the Commission, to wit, *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67; *Federal Trade Commission* v. *Standard Education Society*, 302 U. S. 112 and *Muller, E. B. & Company* v. *Federal Trade Commission*, 142 F. 2nd 511, **likewise are not in point.** These cases stand for the proposition that the Commission's findings are conclusive **if supported by the evidence.** Moreover in these cases no trade secret was involved.

In the case at bar, there is *no evidence at all* to support the Commission's findings since they are based on a *star chamber proceeding*, the secret hearing.

Fair Play—the Proceedings Before the Federal Trade Commission Were Extremely Unfair.

True administration of justice was thwarted by the Federal Trade Commission. There was no fair hearing. There were no findings based on fact or on evidence. The findings were not warranted by the record. The right to a full and fair hearing is one of the substantial rights of a litigant. The right to a *full cross-examination was systematically thwarted by the Federal Trade Commission* as the record clearly shows.

The Federal Trade Commission's Smoke Screen.

The Commission has raised a smoke screen to camouflage the real issue. The Commission erroneously is under the impression that this contest is principally concerned with its definition as to pickproof and with the definition insisted upon by the petitioners.

The Commission and the court below thus short circuited the real issue, namely, whether the petitioners' lock cylinder is or is not pickproof. **Only open demonstrations accessible to the petitioners can prove this fact.** These demonstrations are relevant and material to the issue for the issue is directed to the use of the expression "pickproof".

Dangerous and Damaging Precedent Established by the Federal Trade Commission.

Petitioners' "pickproof" cylinder was designed to resist marauders and criminals from breaking into homes. In other words, this pickproof cylinder in a way is an arm of good Government. By the Commission's actions, the petitioners have been placed in a wrong position and have been unjustifiably treated to deprive them of their Constitutional rights to a fair hearing and fair cross-examination of the Commission's witnesses.

If this case is not heard by this Court, it will mean that the Federal Trade Commission or any other governmental tribunal has the right to hold a "one-sided" hearing based on a pseudo trade secret, and thereafter set down findings based on no evidence. This is a dangerous precedent and it is respectfully submitted should not be permitted by this Court.

The Federal Trade Commission's Secret Hearing is Vicious and Contrary to Good Public Policy.

It is earnestly urged that the Court reanalyze petitioners' brief for the writ of certiorari requested. Even if the Commission's *disputed definition* be accepted, that is, "picking may be defined as the opening of a lock without the use of the original or *duplicate key* and without damage to the lock", there is nothing in the record to indicate that the Commission's witnesses as such **in the secret hearing did not fashion or build a duplicate key. The Trial Examiner did not realize that a duplicate key may have been built up or fashioned by the use of picks by the Commission's witnesses in the secret hearing. Petitioners could not refute this statement because they had no knowledge of what was going on in the secret hearing involving the secret demonstrations by the Commission's witnesses.** At any rate, the findings by the Commission are based on a secret hearing and, therefore, should not bind the petitioners.

The Tests Were Not Conducted for the Protection of the Petitioners' Rights.

The tests in camera proved nothing. Petitioners had a right to be present. To observe and see the demonstrations by the Commission's witnesses. These tests were *relevant to the issue.* Thus the test should have been in the open and accessible for the issue is limited to the *pick-*

proof characteristics of petitioners' lock. There are no other issues. *The petitioners are not concerned with methods of picking as the Commission would desire to have this Court believe.* The only question to be determined is whether the petitioners' cylinder is pickproof or is not pickproof. The secret hearing by the Commission did not answer this question—certainly not through the unfair hearing in this case.

Question of Great Public Importance.

The question whether a federal bureau following its bill of complaint in the attempt to prove the alleged charge of the bill of complaint has the right to exclude the parties charged from the hearing, on facts relevant to the issue, should be decided by this Court. This question is of great importance to industry and to the public at large. This Court, it is believed, has never decided this question. **And the only cases in point substantiate petitioners' contention.**

In view of the foregoing, petitioners respectfully request that the Court's action in declining to grant the writ of certiorari be reconsidered and thereafter granted.

January 26, 1945, Washington, D. C.

Respectfully submitted,

CHARLES M. PALMER,
Attorney for Petitioners.

I hereby certify that the foregoing petition for rehearing has been presented in good faith and not for purposes of delay and is well founded in law and in fact.

CHARLES M. PALMER (L. S.)